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In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. 574

UNITED STATES,
Petitioner,

v.

ESTATE OF JOSEPH P. GRACE, Deceased, et al.,
Respondents.

On writ of certiorari to the United States Court of Claims

BRIEF FOR RESPONDENTS

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JURISDICTION

Respondents contend that the Court lacks jurisdiction of this case for the reasons stated in their brief in opposition to the petition for a writ of certiorari.

QUESTION PRESENTED

Whether the value of property, consisting of the family homestead and stock furnishing enough income to pay the annual real estate taxes thereon, transferred by the decedent's wife in trust giving the decedent a possessory life estate therein, was properly excluded from the decedent's gross estate because it was not property of which the decedent had at any time made a transfer under which he retained a life estate, within the meaning of Section 811 (c) (1) (B) of the Internal Revenue Code of 1939 applied in the light of the "reciprocal trust doctrine", notwithstanding that fifteen days earlier the decedent had transferred various commercial investment properties in trust under which income was payable to his wife for her life, where the facts were found to be: that although the two trust instruments were similar in form, the purposes, practical and economic effects, character and function of each trust were entirely different from those of the other trust; that the two trusts were not created to avoid estate taxes but merely as another step in a long-established pattern of family giving; and that the decedent's transfer in trust and his wife's transfer in trust were each made gratuitously and not in consideration of or reciprocation for the transfer of the other.

STATUTES INVOLVED

Section 811, Internal Revenue Code of 1939 (26 U.S.C., 1939 Code, §811):

"SEC. 811. GROSS ESTATE.

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible, or intangible, wherever situated, except real property situated outside of the United States—

"(c) * * * (1) GENERAL RULE.—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

* * *

"(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; or

* * *

"Subparagraph (B) shall not apply to a transfer made before March 4, 1931; nor shall subparagraph (B) apply to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931[1] (46 Stat. 1516).

[1] The joint resolution, expressly made applicable to the transfer involved in the present case by this provision, is reproduced immediately below.

* * *

"(d) * * * (2) TRANSFERS ON OR PRIOR TO JUNE 22, 1936—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth * * *."[1]

Joint Resolution of March 3, 1931 (c. 454, 46 Stat. 1516):

"RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the first sentence of subdivision (c) of Section 302 of the Revenue Act of 1926 is amended to read as follows:

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment

[1] Section 302(d) of the Revenue Act of 1926 (c. 27, 44 Stat. 9-131) as originally enacted and as in effect in December, 1931, contained the identical language of Section 811(d)(2), above, except that the caption, making this language applicable only to transfers on or prior to June 22, 1936, was not contained in the original 1926 Act. Section 805 of the Revenue Act of 1936 (c. 690, 49 Stat. 1744) amended this provision, but specifically provided in subsection (b) that the amended language was not applicable except in case of transfers made after June 22, 1936, the date of enactment of the Revenue Act of 1936. The Congress, in enacting the Internal Revenue Codes of 1939 and 1954, deliberately preserved this dichotomy to prevent retroactive application of the 1936 amendment, by providing separate paragraphs applicable respectively to transfers *after* and *before* June 22, 1936 (Section 811(d)(1) and (2) of the 1939 Code and Section 2038(a)(1) and (2) of the 1954 Code). Thus, with respect to the transfer in trust involved in the present case, where the transfer was made in 1931, the applicable statutory language has remained unchanged from 1926 to the present time.

at or after his death, (including a transfer under which the transferor has retained for his life or any period not ending before his death:

(1) The possession or enjoyment of, or the income from, the property, or

(2) The right to designate the persons who shall possess or enjoy the property or the income therefrom,

except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

STATEMENT

1. Nature of the Controversy.

This is a suit to recover an estate tax deficiency and interest thereon collected from respondents on July 14, 1954, based on an adjustment made by the Internal Revenue Service adding to the decedent's gross estate the assets of a certain trust (herein called the "Janet Grace trust"), with the following explanation:

> Represents reciprocal trust made by decedent's wife, Janet, on Dec. 31 [sic], 1931, for the benefit of decedent. Includible in the gross estate under Section 811(c) of the Internal Revenue Code. A full explanation of this adjustment was given to the estate representatives. (Finding 24, R. 107.)

A timely claim for refund was filed, based on the contention that the Janet Grace trust was not a reciprocal trust and was not includible in the decedent's estate (Finding 25, R. 108). This suit followed.

Section 811(c) of the Internal Revenue Code of 1939, under the authority of which the Internal Revenue Service

purported to act, provided that the value of the gross estate of a decedent should be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, "To the extent of any interest therein of which the decedent has at any time made a transfer * * * by trust or otherwise * * * under which he has retained for his life * * * the possession or enjoyment of, or the right to the income from, the property * *." (Op. 2, R. 57.)

It is clear that under the provisions of the Janet Grace trust, the decedent for his lifetime had the right to the income from the income-producing portion of the trust property, and that he was entitled to the possession and enjoyment of the remainder of the trust property. On the other hand, the decedent, at least in form, was not the settlor of the trust, he had not directly "made a transfer" of any property or interest in property to the trust, and, strictly speaking, he had not "retained" any beneficial interest in the trust property but, rather, had obtained such interest by virtue of the instrument creating the trust. The person who executed the instrument creating the trust of December 30, 1931, and who directly transferred to that trust all the property covered by it, was the decedent's wife, Janet Grace (hereinafter sometimes called "Janet"). (Op. 2-3, R. 58.)

The defendant (petitioner) contended in the court below that the decedent, by himself creating on December 15, 1931, a reciprocal trust which conferred on Janet Grace benefits

similar to those which were conferred on the decedent by the Janet Grace trust, furnished consideration for the creation of the Janet Grace trust; and, therefore, that for estate tax purposes the decedent and Janet should be switched or crossed as settlors and the decedent should be regarded as having been in substance the settlor of the Janet Grace trust. This contention was based upon a judicially developed rule that was first announced in the case of *Lehman v. Commissioner*, 109 F. 2d 99 (2d Cir. 1940), cert. den. 310 U.S. 637. (Op. 3, R. 58.)

II. The Janet Grace Trust.

On December 30, 1931, Janet executed the trust instrument creating the Janet Grace trust (Finding 12(a), R. 98) and transferred it to the family homestead property, known as "Tullaroan", and 40 shares of stock in a corporation known as "Lundy's Lane Corporation" (Finding 12(b), R. 101).

Tullaroan was a large country estate (approximately 167 acres) located on Long Island, which was occupied by the decedent and his wife as their family homestead, beginning about 1911 and continuing thereafter as long as each of them lived (Finding 6(a), R. 89).

Janet had owned the Tullaroan property since April 5, 1911, when the decedent acquired title for her and paid the purchase price as a gift to her; thereafter, the decedent had made additional gifts to his wife by payment of the costs of construction of buildings and improvements on her prop-

erty, and his uncle paid for substantial additions to the main residence in about 1920 (Finding 6(b), R. 89). The improvements on Tulloroan included a 65-room mansion with various auxiliary buildings and improvements (Finding 6(a), R. 89). The latest improvement on the property had been an indoor tennis court building completed in 1926 at a cost of $97,725.97 (Finding 7(a), R. 90).

The gift of the 40 shares of Lundy's Lane Corporation stock to the Janet Grace trust was merely an adjunct to the transfer of Tullaroan in trust. The express purpose of placing these shares in trust with the homestead was to furnish annual dividend income in the amount required to pay ad valorem taxes on Tulloroan (Finding 45(d), R. 116). Lundy's Lane Corporation had been incorporated on November 9, 1923, by Janet to hold certain securities which she had received as gifts from the decedent at various times during the years 1917, 1918, 1919 and 1922. All of its capital stock (607 shares) was originally owned by Janet. She never made any transfer or disposition of any of such shares except by gifts to her husband and children. She made a gift of 200 shares to the decedent on March 31, 1929, of which the decedent made gifts of 100 shares to trusts for his five children on April 4, 1930 (Finding 12(d), R. 101). On December 30, 1931, she made the gift of 40 shares, out of the 407 shares she then owned, to the Janet Grace trust (Finding12(b), R. 100). She gave 2 shares to a trust for one son in 1935 and 2 shares to the other four children in 1937 (Finding 17, R. 104). At the time of her death on Decem-

ber 31, 1937, Janet still owned the remaining 363 shares of Lundy's Lane Corporation, which were included in her taxable gross estate (Pl. Ex. 34, Sheet 24, Schedule B, Item II).

There was no change whatever in the use and enjoyment of the homestead by the decedent, Janet, and their children as a result of the transfer of legal title from Janet to herself and her co-trustees as trustees of the Janet Grace trust. At the time of creation of the trust, neither the decedent nor Janet ever expected to leave Tullaroan during their lives; and, in fact, both continued to live there until they died. (Finding 12(c), R. 101.)

Under the provisions of clause *First* of the trust instrument creating the Janet Grace trust, Janet expressly retained the power as trustee to change the enjoyment of the property she had transferred to the trust through the exercise of a power, in conjunction with either one of the other two trustees, to alter, amend or revoke her transfer by distributing outright to the decedent during his life "any amounts of the principal of said trust, up to and including the whole thereof, which the said Trustees or a majority of them may at any time or from time to time deem advisable" (Finding 12(a), R. 98-99). Janet Grace retained that power of revocation as one of the trustees of the Janet Grace trust until her death (Finding 19, R. 104).

III. The Joseph Grace Trust.

The decedent, on December 15, 1931, had created a trust, hereinafter called the "Joseph Grace trust" (Finding 11(a), R. 92). The decedent on December 15, 1931, transferred to himself and two others as trustees of this trust all of his minority interest (20% to 25% in each case) in three real estate development enterprises, Gilchrest Realty Corporation, Belgrave Realty, Inc. and Grace Harbor joint venture; two unimproved tracts of land, Yaphank (about 1,000 acres) and Bell-Brookhaven Lot 26 (3.6 acres); buildings in New York City known as 310-312 East 37th Street; a rental cottage called Thomaston Cottage No. 5; and 150 shares (out of 760 shares then outstanding, all of which were owned by the decedent) of a personal holding company known as Thomaston Corporation (Finding 11(b), R. 94-95. The shares of stock of Gilchrest Realty Corporation and Belgrave Realty, Inc., the one-fourth interest in Grace Harbor joint venture, and Thomaston Cottage No. 5 had all been received by the decedent by means of gifts and inheritances, while the Yaphank, Bell-Brookhaven Lot 26, and 310-312 East 37th Street properties had been purchased by the decedent as speculative investments in 1926 and 1928 (Findings 11(c), (d), (g) and (h), R. 95-97).

In transferring these properties to the Joseph Grace trust, the decedent, as a trustee of his trust, retained under the express terms of the trust instrument the power to change the enjoyment of the trust property through the exercise of a power, in conjunction with either one of the other two

trustees, to pay to Janet "any amounts of the principal of the said trust, up to and including the whole hereof, which the said Trustees or a majority of them may at any time or from time to time in their sole discretion deem advisable" (Finding 11(a), clause *First*, R. 93). By the exercise of this power, the decedent could effectively terminate the trust and thereby alter, amend or revoke his transfers of the properties at any time while the trust continued in existence. He elected to revoke his transfer of the 150 shares of Thomaston Corporation only four months after the transfer by distributing those shares on April 27, 1932, to Janet, who donated them back to him on the same day (Finding 11(e), R. 96).

The duration of the Joseph Grace trust was "during the life of my wife, Janet Grace", and by its provisions it terminated and was to be distributed "upon the death of my said wife" (Finding 11(a), clauses *First* and *Second*, R. 93). Janet Grace died on December 31, 1937, at the age of 53 years (Finding 18(a), R. 104), and by its terms the Joseph Grace trust then expired. The decedent died in 1950, at the age of 73 years (Finding 22, R. 107), about 13 years after the Joseph Grace trust terminated.

IV. Background and Events Leading to Creation of Trusts.

The transfers of property by Janet and the decedent to the Janet Grace trust and the Joseph Grace trust, respectively, were made in continuation of, and as another step in, a long-established pattern of family giving which

began as early as 1911, continued for many years, and which involved numerous transfers of valuable property and financial interests among the members of the family (Op. 11, 12, and 16, R. 68, 69 and 74). The pattern of creating trusts for the benefit of members of the family and of transferring assets directly to members of the family continued during the years that followed the creation of the Joseph Grace trust and the Janet Grace trust in December of 1931. Both the decedent and Janet were involved in such actions (Op. 9, R. 66).

This pattern commenced with the decedent's original gift of Tullaroan to Janet and his subsequent donation of the cost of substantial improvements thereon (Finding 6(a) and (b), R. 89). Substantial gifts of valuable properties by the decedent to or for his wife and children were shown to have been made on one or more (often several) occasions during each year (excepting only 1921 and 1924) from 1917 through 1930. These included 24 transfers of property and financial interests by the decedent to Janet from 1917 through 1929, as well as 26 transfers in trust for the benefit of his children from 1920 through 1930 (Op. 5-6, R. 61-62; Findings 7 and 8, R. 90-91).

Although Janet had no wealth or property of her own at the time of her marriage to the decedent, and did not thereafter inherit any substantial wealth, as a result of his generousity, she ended up having approximately as much

wealth as he did (Findings 4, R. 88, and 31, R. 109-110). The capital account on her books showed a net worth at book value of $3,633,133.26 on December 31, 1931, after the creation of the Janet Grace trust (Finding 14, R. 102). At the time of her death in 1937, the capital account on her books showed a net worth at book value of $3,550,131.04, and her gross estate (excluding the Janet Grace trust) was valued for Federal estate tax purposes at a total value of $5,550,481.78 (Finding 18(b), R. 104).

Janet, although more often the recipient of the decedent's generosity, had also participated in the pattern of gifts to family members. The record contains evidence concerning five instances during the period from 1920 through 1929, when Janet made transfers of assets to or for the benefit of the decedent or their children (Op. 6, R. 62; Finding 9, R. 91).

The events that led directly to the creation by the decedent of the Joseph Grace trust and to Janet's transfer of property to the Janet Grace trust began in the early part of December, 1931, when the decedent conferred with J. Morden Murphy, head of the Customers' Securities Department of W. R. Grace & Co., whose services he used to assist him in managing the properties and business affairs of the family, including property and financial interests owned by Janet. The decedent believed that a new gift tax would

probably be enacted and become effective early in 1932,[9] and he was anxious to carry out promptly the creation of additional trusts by him and Janet for the benefit of the family, in furtherance of their long-established pattern of family giving, prior to the close of 1931 in order to avoid paying the anticipated gift tax in connection with transfers of assets to such trusts (Op. 7, 11, 12 and 16, R. 63, 68, 69-70 and 74; Findings 15, R. 102, and 45(e), R. 116).

Although there is no direct evidence in the record relative to the circumstances that were involved in the transfers of assets by Janet, the court below considered that "it is reasonable to infer that such transfers were made by Janet Grace in accordance with plans devised by the decedent" (Op. 7, R. 63). Generally, Janet did not concern herself with business matters but relied upon the decedent to manage her property and financial interests. Trusting in his wisdom and benevolence, she customarily followed his suggestions, advice, recommendations or requests with reference to disposition of her properties, even when gifts by her to the decedent were involved (Op. 6-7, 12, R. 62-63 and 70; Findings 5(a), R. 88, and 31, R. 110).

[9] The gift tax law was enacted by Congress in the following session and became effective on June 6, 1932, Sec. 501, et seq., Revenue Act of 1932 (c. 209, 47 Stat. 169-289). Prior thereto, a gift tax had been levied by Sections 319-324, Revenue Act of 1924 (c. 234, 43 Stat. 253-355), and amended by Section 324 of the Revenue Act of 1926 (c. 27, 44 Stat. 9-131). The 1924 Act, enacted June 2, 1924, was retroactively applicable to all gifts made during the calendar year 1924. The 1926 Act retroactively reduced the gift tax rates under the 1924 Act, and made the gift tax as reduced applicable only to gifts during the calendar years 1924 and 1925, in effect repealing the gift tax for 1926 and subsequent years. From that time until the Revenue Act of 1932, there was no gift tax. Therefore, when the trusts here involved were created in December, 1931, there had been no gift tax for about six years.

The decedent initiated the idea of the Janet Grace trust and made all the arrangements for preparation of instruments; she did not participate in the planning or preparation of the Janet Grace trust, but created that trust upon the recommendation of the decedent pursuant to plans and arrangements initiated by him (Findings 5, 10 and 12(a), R. 88, 92 and 98; Op. 12, R. 70). There is no basis in the record for a finding that Janet Grace, in transferring Tulloroan and 40 shares of stock to the Janet Grace trust, was influenced in any way by the circumstance that the decedent had previously created the Joseph Grace trust. Indeed, there is no evidence in the record that Janet, when she created the Janet Grace trust, even knew about the creation of the Joseph Grace trust by the decedent. On the basis of the whole record, the Court of Claims considered it reasonable to infer that Janet executed the instrument creating the Janet Grace trust and transferred property to that trust merely because the decedent requested that she do so (Op. 12, R. 70; Finding 12(e), R. 102).

In connection with the Joseph Grace trust and the Janet Grace trust, neither the decedent nor Janet had any desire to acquire property from the other (Finding 15, R. 102).

The Joseph Grace trust and the Janet Grace trust were not created, and properties were not transferred to these trusts, pursuant to any agreement, express or implied, between the decedent and Janet to make reciprocal transfers of properties (Finding 29, R. 109).

The transfer of property by the decedent to the Joseph Grace trust was not in consideration of the transfer of property by Janet to the Janet Grace trust; and the transfer of property by Janet to the Janet Grace trust was not in consideration of the transfer of property by the decedent to the Joseph Grace trust (Finding 30, R. 109).

V. Remand Proceedings in the Court Below.

On July 20, 1964, Trial Commissioner Mastin G. White submitted an opinion, findings of fact and recommended conclusions of law (30 printed pages), based on the evidence accumulated in elaborate pre-trial submissions, trial in New York City in the latter part of 1963 (565 transcript pages), proposed findings and objections thereto and exhaustive briefs on behalf of both parties, and a thorough and painstaking review, analysis and evaluation of the evidence of record by the Trial Commissioner. The findings of fact submitted with the Trial Commissioner's report of July 20, 1964 (R. 9-38) consisted of Findings 1 through 30, inclusive, as ultimately adopted by the Court of Claims and incorporated in its decision (R. 87-109).

Upon review of the first report of the Trial Commissioner, after submission by both parties of exceptions to the Commissioner's recommendations, extensive printed briefs (255 pages) and formal oral argument before the five Judges, sitting *en banc*, the Court of Claims remanded the case to the Trial Commissioner. Being unable to offer any convincing opposition to the factual conclusion that the two trusts

involved in this case were not created in consideration of each other, the Government's brief and argument were instead grounded upon the theory that the "reciprocal trust doctrine" should be applied in this case to frustrate a scheme designed to avoid estate taxes, asserting that tax-avoidance purposes should be assumed to exist on the basis of alleged facts not shown by the record. Apparently being convinced by the Government's argument that tax-avoidance motives were controlling, yet unwilling to assume without proof the disputed allegations, a majority of the judges[4] of the Court of Claims issued an order dated March 25, 1966 (R.39), remanding the case to the Trial Commissioner for a further hearing on the question: —

> "* * * whether the decedent was motivated in the setting up of the Joseph Grace and the Janet Grace trusts, in December 1931, by the desire to avoid or lessen estate taxes."

After a further trial in which additional testimony (to the extent of 430 transcript pages) was received, and numerous additional documentary exhibits were admitted in evidence, and after additional proposed findings and objections thereto and exhaustive briefs were submitted on behalf of both parties, and after the Trial Commissioner thoroughly reviewed, analyzed and evaluated the entire record, a Supplemental Report of Commissioner to the Court was filed on February 23, 1967 (R. 41-55). It contained additional Findings 31 through 53 (R. 109-123), including the following

[4] Chief Judge Cowen dissented. A motion for re-hearing filed by plaintiffs (respondents) was denied, with Judge Collins dissenting.

conclusion of fact in direct response to the question raised in the Court's remand order (Finding 52, R. 122):

> "52. The evidence in the record does not indicate that Joseph P. Grace was motivated by the desire to avoid or lessen estate taxes in the setting up of the Joseph Grace trust and the Janet Grace trust in December 1931."

The Court of Claims' opinion amplifies this conclusion as follows (Op. 13, R. 71):

> "It appears from the evidence in the augmented record that Joseph P. Grace never said or did anything which would indicate or imply that he was motivated by the desire to avoid or lessen estate taxes when he created the Joseph Grace trust on December 15, 1931 and caused his wife to create the Janet Grace trust on December 30, 1931. The evidence also establishes the existence of other logical and even compelling motives for these transactions."

And the Trial Commissioner commented in his supplemental report (R. 45):

> "The additional evidence that has been added to the record does not change my original conclusion that Joseph P. Grace, when he created the Joseph Grace trust on December 15 and caused his wife to create the Janet Grace trust on December 30, 1931, was merely continuing a long-established pattern of conduct."

VI. Decision of the Court of Claims.

The majority of the Court of Claims reviewed the terms of the statute (Op. 2-3, R. 57), the leading *Lehman* case (Op. 3-4, R. 58-60), and the numerous cases that have followed and applied it. In the view of the Court, there are

"two lines of cases" or "two divergent views" of the *Lehman* rule, one line holding that whether a decedent is to be treated as settlor of a trust created by another depends upon whether he furnished consideration for the other party's transfer in trust. This, said the Court, is a question of fact which involves an inquiry into the element of motivation (Op. 4, R. 60). A separate line of cases, in the Court's view, applied diffierent legal standards in determining the existence of consideration; they vary somewhat in the statement of the rule, but basically they look at the objective evidence to determine whether trusts created by husband and wife similar to those involved in this case are reciprocal and taxable. (Op. 13, R. 70).

The majority opinion seeks to measure this case by both standards. Because the first line of cases regards the question of the existence of consideration as a factual issue, the Court in seeking to apply that line, analyzed at length all available facts of this particular case, including objective evidence, seeking to assay the relative weight, significance and relevancy which should be attached to all of the available evidence and facts bearing upon the question of whether the decedent's transfer to the Joseph Grace trust was in fact made in consideration for Janet Grace's transfer of property to the Janet Grace trust, or whether her transfer was in reality made in consideration of his. The Court concluded that, factually, neither trust was made in consideration for the other (Op. 4-12, inclusive, R. 60-70).

The Court further measured the evidence in this case against the "separate line of cases" which it deemed to be based upon "objective" evidence. In the view of the Court of Claims, some of these cases hold that consideration will be inferred from the facts that the properties included in the two trusts are of approximately the same amount, that the trusts are created at or about the same time, and that each grantor gives the other a life estate in income, unless such inference is rebutted by clear evidence, citing *Hanauer's Estate v. Commissioner, infra*, and *Orvis v. Higgins, infra*, as examples (Op. 13, R. 70-71). Measuring the case in those terms, the Court stated:

> "Therefore, if we take the view of those cases which impose the burden on the taxpayer to rebut any inference arising under the circumstances of this case that the Janet Grace trust was created in consideration of the trust previously established by the decedent, we think the burden has been met." (Op. 16, R. 74).

The Court further expressed the view that there are other cases, of which it cites only *Estate of Ruxton, infra*, as an example, in which "the presence or absence of a motive to avoid the payment of estate taxes has been an important factor in deciding the application of the 'reciprocal trust' doctrine." Without mentioning any of the evidence favorable to the plaintiffs (respondents) on the question of tax-avoidance motive, the Court very thoroughly analyzed and weighed, in the light most favorable to the Government, the evidence on which the Government relied to establish tax-avoidance motives, and simply found this evidence to

be of insufficient relevancy or probative force, when weighed against all of the other evidence it had heard, to overcome the more compelling conclusion of fact that the two trusts were not created to avoid estate taxes but merely as another step in a long-established pattern of family giving (Op. 13, R. 71, and 15-16, R. 74; Finding 52, R. 122).

SUMMARY OF ARGUMENT

Section 811(c) (1) (B) of the Internal Revenue Code of 1939 authorizes inclusion in the decedent's gross estate of only that property of which the decedent has at any time made a transfer under which he has retained a life estate. Where two persons have each made a transfer of which the other is lifetime beneficiary, each settlor may be taxed as the person who "made a transfer" of the property transferred by the other party, instead of as transferor of the property which he actually transferred, if it is found that the two transfers were made in consideration of each other.

It is the furnishing of a consideration, or *quid pro quo*, by the decedent for the other party's transfer in trust that brings the doctrine into play and constitutes the person who transferred the consideration as the taxable party deemed to have "made a transfer * * * under which he has retained * * *" the rights to which he is entitled under the trust created by the other party.

If the decedent did not, in fact, make a transfer of his own property in consideration for or as a *quid pro quo*

inducing another party to make a trust, even though he has a life estate in property which was transferred to him gratuitously by another person, the property in which he has a mere life estate is not included as part of his gross estate.

The doctrine that a person who furnishes the consideration for the creation of a trust is the settlor for purposes of the estate tax law was first announced in the leading case of *Lehman v. Commissioner*, 109 F. 2d 99 (2d Cir. 1940), cert. den. 310 U.S. 637 (1940). Since then, the rule has been uniformly and consistently applied in numerous cases.

Whenever the evidence has convinced the court that a trust executed by one spouse for the benefit of the other was, in fact, executed in consideration of a trust executed by the other spouse for the benefit of the former, the spouse whose estate tax liability is in question has been held taxable reciprocally as having made a transfer to the trust of which he is life beneficiary.

On the other hand, it is equally well-established that when the evidence indicates that a decedent's transfer in trust was not a consideration or *quid pro quo* inducing his spouse to create a trust for his benefit, the *Lehman* doctrine has been held inapplicable.

As stated in *Estate of Moreno v. Commissioner*, 260 F. 2d, 389, 390 (8th Cir. 1958):

> "The question of whether the doctrine of the Lehman case will be applied — whether the trusts are crossed

or reciprocal trusts — is one of fact. It is simply a question of whether one trust was made in consideration of the other.

The Court of Claims, in the decision under review, correctly applied this principle in accordance with all of the preceding decisions, and as expressly recognized and approved by Congress when it enacted the Technical Changes Act of 1949, and as also recognized and applied by the Internal Revenue Service for many years.

On the basis of detailed findings made after a thorough analysis of all evidence submitted at two full trials, including numerous documentary exhibits as well as a large amount of verbal testimony, the Court of Claims concluded that the decedent's wife, Janet, had not created the Janet Grace trust, of which the decedent was lifetime beneficiary, in consideration of any transfer of property by the decedent, and that when the decedent made a transfer of his property in trust fifteen days earlier, he had not furnished a consideration or *quid pro quo* for the creation of the Janet Grace trust by his wife. This conclusion of fact required a decision in favor of the respondents in accordance with the established principles of law.

Contrary to petitioner's assertions, the term "consideration" has no narrow technical or peculiar meaning in relation to the *Lehman* doctrine, but is used in its commonly understood sense.

The Court of Claims, in its decision here under review, properly applied the consideration test and found that the decedent's transfer of property to the Joseph Grace trust had not served as a *quid pro quo* effective to bring about his wife's transfer to the Janet Grace trust. This was a correct application of the rule, and the decision should be affirmed.

The trusts involved in this case are not a "prototype" reciprocal trust device. Petitioner's brief is addressed primarily to condemnation of a hypothetical prototype, largely without reference to the actual facts of this case. There was no equivalence of benefits which would allow each party to obtain the same practical economic results as if he or she had transferred his own property to himself for life. Moreover, these trusts could not have been used to carry out the tax-avoidance scheme envisioned by the hypothetical prototype case described in petitioner's brief.

The variously stated proposed rules advocated in petitioner's brief as substitutes for the *Lehman* principle would be wholly inadequate and unworkable. The "net effect" test advocated by Professor Lowndes can only be applied to measure the extent of tax liability of a decedent after it is concluded that he is liable for tax, but offers no standard for determining whether he is liable. All such alternative proposals should be rejected in favor of adherence to the *Lehman* doctrine which has proved the satisfactory test that has been uniformly applied by the courts for three decades.

The issue involved in this case is primarily a factual issue, and the well-founded factual conclusions of the trial court should not be disturbed.

Since the issue as presented to the Court basically calls upon the Court to refind the facts, which was not the purpose for which the writ of certiorari was granted, the writ was improvidently granted and should be dismissed, or else this Court should affirm the decision of the Court of Claims.

ARGUMENT

INTRODUCTION

Numerous cases in the lower courts during the 1940's and 1950's involved the tax consequences of trusts made at the same time by two settlors, under which each was the beneficiary of the trust created by the other. This body of judicial decisions is often referred to as the "reciprocal trust doctrine", and is frequently called the "*Lehman* doctrine". It holds that a person who furnishes the consideration for a trust is the settlor. Although this doctrine arose out of trust law and was first adoped as a rule of tax law in a case that involved reciprocal trusts, the principle involved has various other applications in tax law, as well as other fields of law, including trust law.

Thus, Professor Austin W. Scott has observed, "Where the owner of property gratuitously transfers it in trust, he is the settlor", but "a person who furnishes the consideration for the creation of a trust is the settlor, even though in form the trust is created by another person." II *Scott on Trusts,* Sec. 156.3 (3rd Ed. 1967); see also, V. *Ibid,* Secs. 423-424. The *Restatement of the Law of Trusts* specifically

comments on the case where a beneficiary may be treated as a grantor because "he paid the purchase price for a conveyance upon a trust, of which he is the beneficiary or one of the beneficiaries." American Law Institute, *Restatement of the Law of Trusts*, Sec. 156, Comment (f), (2d Ed. 1959). These principles have been applied for Federal tax purposes in a variety of situations not involving reciprocal trusts. See, *e.g.*, *Blackman v. United States*, 98 Ct. Cl. 413, 48 F. Supp. 362 (1943).

More specifically, all of the estate tax decisions involving this question have uniformly adhered to the rule that the decedent whose estate is involved will be considered to have "made a transfer" of his property to the trust created by the other party for his benefit, if such trust was created in consideration of a transfer by the decedent of his own property, but not otherwise.

It is the furnishing of a consideration, or *quid pro quo* by the decedent for the other party's transfer in trust that brings the doctrine into play and constitutes the person who transferred the consideration as the taxable party deemed to have "made a transfer * * * under which he has retained * * *" the rights to which he is entitled under the trust created by the other party.

Because it appears to us that the petitioner's brief has not come to grips with the requirement of consideration and its true import in the precedent decisions, we shall find it necessary to review the matter fully.

I. THE DECISION OF THE COURT OF CLAIMS WAS CORRECT.

A. The sole criterion for taxation under the reciprocal trust doctrine is whether the decedent's transfer in trust is a consideration or *quid pro quo* inducing the other settlor to create a trust for decedent's benefit.

The leading authority with respect to the "reciprocal trust doctrine", where the principle was first announced, is the case of *Lehman v. Commissioner*, 109 F. 2d 99 (2d Cir. 1940), cert. den., 310 U.S. 637 (1940), wherein the decedent and his brother, Allan, each owned an equal undivided one-half interest in certain stocks and bonds. The stipulated facts stated, and the Court found that—

> "The decedent agreed to transfer his share in trust for Allan and his issue, *in consideration* of Allan transferring his share in trust for the decedent and his issue." (Italics supplied).

Pursuant to that bargain, the two brothers simultaneously executed trust indentures in which each transferred his undivided one-half interest in trust to pay the income to his brother for life, remainder to the brother's issue, with the right in the brother to withdraw $150,000. The Court held (109 F. 2d, at p. 100):

> "In this case is happened that the trusts were identical, and the case for a tax is the stronger for it; but the outcome would be the same if the decedent had transferred his share outright to his brother. The *decisive point* is that the decedent *by transfer of his share to the brother* or for the brother's use or according to the brother's direction *caused the brother to make a transfer* of property in trust under which the decedent had the right to withdraw $150,000 from principal. While

Section 302(d) speaks of a decedent having *made a transfer* of property * * *, it clearly covers a case where the *decedent by paying a quid pro quo has caused another to make a transfer of property* with enjoyment subject to change by exercise of such power by the decedent. See 52 Harvard Law Review 1015. 'A person who furnishes the consideration for the creation of a trust is the settlor, even though in form the trust is created by another.' * * * X transfers property in trust for himself for life, with power of revocation. Y goes about it in a slightly different way; he *pays* cash *or transfers* property to another who *in consideration of the cash or property* sets aside or transfers securities in trust for Y for life, with power in Y to terminate the trust and take the principal. Does anyone suppose that X's estate is taxable * * * but that Y's estate is not? Here the transfer by the decedent's brother, *having been paid for and brought about by the decedent*, was *in substance* a 'transfer' by the decedent, and the property so transferred formed part of his taxable estate * * *." (Italics supplied).

To avoid possible confusion, it is important to note at this point that the "cause" which "brought about" the brother's transfer in trust for the decedent's benefit was the *transfer* which the decedent made of his own property. The court said that the "decisive point" of the *Lehman* case was "that the decedent *by transfer of his share to the brother* * * * *caused* the brother to make a transfer * * *." By omitting the relevant portion of that sentence in quoting the *Lehman* case (Pet. Br., p. 17), petitioner's counsel seeks to leave the false impression that the "decisive point" of the *Lehman* case was "that *the decedent* * * * *caused* the brother to make a transfer * * *." However, it was not the decedent's

mere suggestion, recommendation, advice, request, or influence that caused his brother to make a gratuitous transfer for the decedent's benefit — it was the decedent's own *transfer* of his share to his brother that *caused* the brother to make an identical *transfer* to the decedent in consideration therefor.

This relationship of cause and effect between the decedent's transfer of his own property and the rights he thereby obtained in his brother's property is also expressed in the *Lehman* case in the more familiar terms of "consideration" or "*quid pro quo*". The subsequent cases, as shown below, have uniformly adopted this form of expression. The issue of cause and effect is phrased in terms of whether two trusts were created "in consideration of" each other. This consideration test has been uniformly applied in all of the subsequent decisions on the point.

As explained in *Estate of Moreno v. Commissioner*, 260 F. 2d 389, 390 (8th Cir. 1958):

> "The question of whether the doctrine of the Lehman case will be applied — whether the trusts are crossed or reciprocal trusts — is one of fact. It is simply a question of whether one trust was made in consideration of the other."

As with any factual test that is uniformly applied, the *results* of the cases have differed, depending upon the *facts* proved in each case. Opposite facts have produced opposite results. The differing results of the cases are not the result of any conflict or disagreement among the lower courts, but are rather due to distinguishable facts.

Indeed, the apparently "divergent views" noted by the Court of Claims in its opinion below (Op. 4, 13, R. 59, 70), among cases appearing to look at objective evidence with various degrees of conclusiveness, and others more at subjective factors, may be largely due to differences in the evidence before the court in a particular case. A court can only look at the evidence before it, and in some of these cases the record has been very sparse, consisting of stipulated facts. Also, many of the circuit court decisions have been aided by Tax Court findings.

Thus, where the evidence has convinced the court that a trust executed by one spouse for the benefit of the other was, in fact, executed in consideration of a trust executed by the other spouse for the benefit of the former, the spouse whose estate tax liability is in question has been held taxable reciprocally as having made a transfer to the trust created by the other spouse for his benefit. *Estate of Hanauer v. Commissioner*, 149 F. 2d 857 (2d Cir. 1945), cert. den. 326 U.S. 770; *Orvis v. Higgins*, 180 F. 2d 537 (2d Cir. 1950), cert. den. 340 U.S. 810; *Cole's Estate v. Commissioner*, 140 F. 2d 636 (8th Cir. 1944); *Estate of Carter v. Commissioner*, 31 T.C. 1148 (1959); and *Estate of Fish v. Commissioner*, 45 B.T.A. 120 (1941).

On the other hand, it is equally well established that when the evidence indicates that a decedent's transfer in trust was *not* in intent or in effect a consideration or *quo pro quo* inducing his spouse to create a trust for his benefit, the *Lehman* doctrine has been held inapplicable, and the de-

cedent has been held not taxable as having made a transfer to the trust created by his spouse for his benefit, even where the husband and wife have simultaneously executed trusts having identical corpora and identical reciprocal provisions for the benefit of each other. *Estate of Guenzel v. Commissioner*, 258 F. 2d 248 (8th Cir. 1958); *McLain v. Jarecki*, 232 F. 2d 211 (7th Cir. 1956); *Estate of Newberry v. Commissioner*, 201 F. 2d 874 (3rd Cir. 1953), 38 A.L.R. 2d 514; *In re Lueders' Estate*, 164 F. 2d 128 (3rd Cir. 1947); *Tobin v. Commissioner*, 183 F. 2d 919 (5th Cir. 1950), cert. den. 340 U.S. 904; *Commissioner v. McLean*, 127 F. 2d 942 (5th Cir. 1942); *Estate of Ruxton v. Commissioner*, 20 T.C. 487 (1953); *Estate of Resch v. Commissioner*, 20 T.C. 171 (1953); *Welch v. Commissioner*, 8 T.C. 1139 (1947); and *Estate of Lindsay v. Commissioner*, 2 T.C. 174 (1943).

The cases relied upon most heavily by the petitioner are *Estate of Hanauer v. Commissioner, supra; Orvis v. Higgins, supra*, and *Cole's Estate v. Commissioner, supra*. These cases, however, strongly support the consideration requirement and are contrary to the petitioner's theory.

In the *Hanauer* case, the Court of Appeals for the Second Circuit stressed the need to determine whether the decedent's transfer in trust was in fact the consideration or *quid pro quo* that induced and motivated his wife to create the trust for his benefit. Explaining its prior decision in the *Lehman* case, the court reiterated (149 F. 2d, at p. 858):

> "* * * this court held that to the extent that *the decedent's property*, by its transfer in trust, had served as

> *a quid pro quo effective to bring about his brother's transfer*, for purposes of the estate tax the decedent must be treated as the actual settlor under the indenture executed by his brother, — or, in the words of the Act, as the person who had 'made a transfer' in the sense that *by the transfer of his own property* and the consequent impoverishment of his own estate he caused the transfer of his brother's property to be made." (Italics supplied).

The court in *Hanauer* was reviewing a decision of the Tax Court in which it was expressly found as a fact that "Each created his respective trust in consideration of the other. Also, that Carrie H. Hanauer created her trust because her husband, the decedent, created his trust." The court declared (149 F. 2d, at p. 858):

> "We take these findings to mean that the estates created by decedent's trust *served as a quid pro quo for the trust which he caused his wife to make*." (Italics supplied).

Upon review of the record, the court found "abundant evidence to support those findings". The facts emphasized in the opinion dealt with the "mental attitude of the decedent's wife" and her "knowledge and active participation" in the development and execution of *both* trusts, and her "belief" that the decedent was creating a trust of substantial dimensions. These mental factors pertaining to the wife's *subjective motives and intentions* were relied upon "to support a finding that *her transfer was caused by his*." (149 F. 2d at p. 859).

In the decision under review, the Court of Claims distinguished the *Hanauer* case because of opposite facts concerning the motivation of the wife, since in the instant case there was no basis in the record for a finding that Janet Grace, in transferring Tullaroan and 40 shares of stock to the Janet Grace trust, was influenced in any way by the circumstance that the decedent had previously created the Joseph Grace trust; and, indeed, there is no evidence in the record that Janet Grace even *knew* about the creation of the Joseph Grace trust by the decedent (Op. 12, R. 70; and see Finding 12(e), R. 102. In *Hanauer*, the wife had created her trust "because her husband, the decedent, created his trust"; in the instant case, on the other hand, the wife had created her trust "merely because the decedent requested that she do so" (Op. 12, R. 70).

In *Hanauer*, the court emphasized that the motivation of the *wife*, and not of the decedent himself, was the crucial test — whether *she* was motivated or caused to transfer her property in trust by his transfer in trust. If the wife's creation of her trust were motivated, induced and caused by the decedent's transfer in trust, then his transfer of property was the consideration or *quid pro quo* for his wife's trust, justifying treatment of him as its settlor. Since the case did not involve the question whether the wife should be treated as settlor of the husband's trust, it was immaterial

whether the wife's transfer had been the motivating cause of the decedent's transfer in trust.[5]

Similarly, in *Orvis v. Higgins, supra*, the Court of Appeals for the Second Circuit recites the facts with reference to conversations which the husband and wife had with their son, their attorney, and each other, indicating a course of bargaining, negotiation and agreement in which the wife was an active particpant, leading to the factual conclusion "that each of those trusts was made in consideration of the other" (180 F. 2d, at p. 540). The opinion also refers to "a case like this, on an issue relating to intention" and states "we find that reciprocal was *intented*" (180 F. 2d, p. 541).

The case of *Cole's Estate v. Commissioner, supra*, most strongly relied upon by petitioner, is somewhat more complex, in that the estates of both husband and wife were before the court in a consideration case. The court advanced alternative grounds of decision — one upholding the Tax Court in taxing each decedent *reciprocally* as settlor of the trust created by the other spouse, and the other holding

[5] The *Hanauer* case also confirms that the question whether one trust was made in consideration of the other trust is purely a question of fact, as to which the results will differ when different facts are found. The court found "no fundamental inconsistency" between the decisions of the Tax Court in that case and in the case of *Estate of Lindsay v. Commissioner, supra*, wherein similar trusts in substantially equal amounts executed by husband and wife at about the same time were held not taxable reciprocally under the *Lehman* doctrine, because the facts as found by the Tax Court indicated that the two trusts "were not made each in consideration of the other" (2 T.C., at p. 179). The Second Circuit pointed out that in both cases "it was within the power of the trier of fact to make its own conclusion from the basic facts", and that "neither due regard for legal principle nor indeed for consistent action required it to make a similar finding upon the different record presented here * * *." (149 F. 2d at p. 859).

that each decedent's estate should be taxed *non-reciprocally* upon "the 300 shares which he himself transferred to the trust created by him" (140 F. 2d, at p. 638). In that case, since both estates were before the court, it made no difference whether each decedent was taxed upon the trust that he himself (or she herself) created or upon the precisely identical trust created by his wife (or her husband). But in the present case it does make a difference whether the decedent is deemed to have been settlor of his own trust or of his wife's trust. Whatever else the *Cole's Estate* case may stand for, it certainly adheres to the requirement of a finding that one trust was made in consideration of the other trust, in order to tax the settlor *reciprocally* as having made a transfer to the *other* settlor's trust. The court construed the findings of the Tax Court to mean that one trust was made in consideration of the other trust, pursuant to an exchange. But assuming that no specific finding of consideration was made, the court made it clear that the respective settlors could not be taxed reciprocally as settlors of each other's trusts.[6]

In *Estate of Guenzel v. Commissioner, supra*, two trusts created by a decedent and his wife on the same day, identical as to form and value, having the same trustee, each naming the other spouse as primary life income beneficiary and himself as secondary life income beneficiary, were held to be not

[6] The *Cole's Estate* case was subsequently clarified and explained by the Eighth Circuit in *Estate of Guenzel v. Commissioner, supra*, where the court explained that the second alternative, regarding each settlor as non-reciprocal transferor to his own trust, was "the real basis for the decision". (258 F. 2d, at p. 254).

taxable reciprocally because of the failure to prove that one trust was in fact created in consideration of the other trust. In arriving at that conclusion, the court relied upon and quoted extensively with approval the cases of *Estate of Newberry v. Commissioner, supra; McLain v. Jarecki, supra;* and *Estate of Ruxton v. Commissioner, supra;* also citing with approval *In re Lueders' Estate, supra* (258 F. 2d, at pp. 251-254). The Court concluded:

> "We have heretofore indicated our view that there was no legal consideration for the creation of the respective trusts. Since there was no bona fide consideration for the establishment of the trusts, no foundation existed for the application of the Lehman doctrine."

Curiously, petitioner claims the *Guenzel* case as supporting its theory (Pet. Br., pp. 19, 28, 35). Yet *Guenzel's* case is obviously in the mainstream of all the cases holding, as does the Court of Claims decision reviewed, herein, that the *Lehman* doctrine is inapplicable when the facts of the case disclose the absence of consideration.

The petitioner also claims that its theory is supported by *Glaser v. United States,* 306 F. 2d 57 (7th Cir. 1962); *Olson v. Reisimer,* 271 F. 2d 623 (7th Cir. 1959); and *Commissioner v. Warner,* 127 F. 2d 913 (9th Cir. 1942). However, none of these cases are in conflict with the Court of Claims decision in the present case. The *Glaser* and *Olson* cases are entirely different—both deal with transfers of jointly owned property in which the decedent retained an interest, and both hold only that the decedent's estate is taxable on his *own* half interest of which he had made a

transfer under which he retained a life interest; neither case held the decedent taxable on his *spouse's* half interest in the jointly owned property. The petitioner's assertion that the latter two cases, which do not even involve the "reciprocal trust doctrine", somehow overruled *McLain v. Jarecki, supra* (Pet. Br., p. 20, fn. 10), is patently absurd. And the petitioner points to nothing in *Commissioner v. Warner, supra,* which is even claimed to be in conflict with the consistent body of law holding that a finding of consideration furnished by the decedent is essential, that case being merely an obvious application of the *Lehman* principle that the person who furnishes the consideration for a trust is its settlor. *Cf. Hill's Estate v. Commissioner,* 229 F. 2d 237 (2d Cir. 1956).

The Tax Court has also consistently applied the consideration test. In *Estate of Carter v. Commissioner, supra,* that Court observed with reference to the principal of the *Lehman* case (31 T.C., at p. 1152):

> "Whether the principle is applicable in a given situation is, of course, dependent upon the particular facts presented. * * * Thus the issue resolves itself into a question of fact, namely whether Ernest and Laura each created his (or her) trust in consideration of the creation of the trust by the other. * * * The question is one of motivations of the two settlors. Their candid testimony might, of course, be the best evidence of their motives in creating the trusts involved. Since they are both dead, we must rely upon other evidence to discern their motivations."

Referring to the cases of *Newberry's Estate v. Commissioner, supra;* and *McLain v. Jarecki, supra,* the Tax Court said in the *Carter* case (31 T.C., at p. 1154):

> "Because the question involved in all reciprocal trust cases is factual, little purpose is served by an extensive discussion of the factual background of each case. As we understand the *Newberry* and *McLain* cases, the decisive test for the application of the *Lehman* doctrine is whether the trusts were executed in consideration of each other. Our treatment of the issue here is consistent with this principle and we do not regard our disposition to be contrary to those cases."

In *Estate of Eckhardt v. Commissioner,* 5 T.C. 673 (1945), a husband and wife executed substantially identical trust instruments for each other's benefit six days apart, the subject matter of each trust being an undivided one-half interest in properties which had been jointly owned by the two settlors. The Tax Court findings clearly supported an inference that an agreement had been entered into between the spouses. Based on the conduct of the parties indicating a course of negotiation and agreement, the Tax Court concluded that "these trusts were executed under such circumstances as would justify the respondent in determining that they were reciprocal and executed in consideration of one another."

In *Newberry's Estate v. Commissioner, supra,* the Court analyzed the *Lehman* case and explained (201 F. 2d, at p. 877):

> "* * * Thus, procedurally, the establishment of 'reciprocal' or 'crossed' trusts was a technical device for realizing the quid pro quo of a bargain.

"The foregoing analysis is important because some of the subsequent cases which apply the Lehman doctrine have stressed the fact that trusts contained 'reciprocal' or 'crossed' provisions without spelling out that this circumstance is significant only to the extent that it may reveal a quid pro quo which another than the named grantor has paid for the creation of the trust in controversey. * * *."

In the *Newberry* case, trusts created simultaneously by a husband and wife having identical crossed provisions and identical assets were held not taxable under the "reciprocal trust doctrine" in the absence of actual proof that the trusts were created as consideration for each other pursuant to a bargain and exchange.

The Court explained the nonsignificance of "interdependence", used in any sense other than to import a bargain for consideration, as follows (201 F. 2d, at p. 877):

"The 'unity' of action of husband and wife and the 'interdependent' character of their transactions, * * * are not such circumstances as the *Lehman* doctrine comprehends. Spouses in mutual confidence and common interest work out together what each is going to do with his own money to provide for their children. In the normal case, which this appears to be, it is a distortion of meaning to say that the action of one spouse is a quid pro quo inducing the action of the other. The only 'consideration' is the historic 'consideration of love and affection' for the dependent members of one's family. Similarity of action occurs because each spouse is confident that they together have arrived at a wise and benevolent decision concerning the future welfare of their children. That is all there is to the 'unity' and 'interdependence' of action revealed by such a record as we have here. Neither the substance of the

transaction nor the identity of the actor is revealed as any different from what appears on the face of each trust indenture."

McLain v. Jarecki, supra, confirms the lack of significance of similar language in the trust instruments. There, a husband and wife had each simultaneously executed substantially identical trusts for the benefit of each other for life, prepared by their mutual lawyers. In the absence of proof of a bargain or trade for consideration, nevertheless, the husband's estate was held not taxable on his wife's trust. The Court of Appeals for the Seventh Circuit held (232 F. 2d, at pp. 212-213):

> "The short of *Lehman* is that a person becomes the settlor of a trust *if he supplies the consideration,* in spite of another person's mechanical declaration of the trust. * * * *
>
> "* * * Because the McLains had substantially identical trusts created concurrently and prepared by their mutual lawyers, the government would have us infer *an element of consideration* from which to hold that decedent was the actual grantor of the trust in which his wife declared herself to be the grantor. * * * To reach the inference, *indispensable for the government's position,* would mean compounding probabilities on the subjective impression we have of the objective stipulated facts. * * * *." (Italics supplied).

Similarly, in the case of *In re Lueders' Estate, supra,* where a husband executed a trust for the benefit of his wife for life with power to terminate and withdraw the corpus; the wife fifteen months later created a similar trust of equivalent value for the husband's benefit; and thirty days

thereafter the husband exercised his power to terminate and withdraw the corpus of the trust created by the wife. The two trust instruments contained reciprocal benefits, were both drafted by the same firm of attorneys and "were cast substantially in the same pattern". Notwithstanding the similarity of the trust instruments and the fact that the husband received from his wife securities equivalent to those which he transferred in trust for his wife's benefit, it was held that the trust created by the husband was not taxable as part of his wife's estate under the reciprocal trust theory. The Court declared (164 F. 2d, at pp. 132-133):

> "At the outset it must be stated that the Tax Court made no specific finding either in its finding of facts or in its opinion, that the decedent and her husband had ever *entered into an agreement*, express or implied, to make reciprocal transfers of property. * * *
>
> "Despite the failure to find that there was any *agreement or understanding to make the reciprocal transfers*, and despite the fact that the trusts were created 15 months apart, the Tax Court, in apparent recognition of *the requirement that consideration must be established in order for the Lehman doctrine to become applicable*, concluded in its opinion that there was 'consideration' by a curious series of deductions, which in view of the record itself fail to attain the dignity of factual inferences and can only be described as 'hunches'. * * *."

The Court in the *Lueders* case rejected the Government's contentions that the application of the *Lehman* doctrine "does not depend upon whether decedent furnished legal consideration for the creation of her husband's trust" and that "while the decisions applying the principal speak of 'consideration', this has meant consideration in the sense

that, because of knowledge of the other transfer or of a tacit understanding between the parties, the transfer of the decedent was not an independent act." The Court pointed out that the cases relied upon by the Government did not sustain that contention. (164 F. 2d, at p. 134). After discussing the prior cases, the Court stated (164 F. 2d, at p. 135):

> "It is evident that the Tax Court's error in the instant case flows from its misconception (1) as to the *compelling necessity to establish existence of legal 'consideration'* at the time of the creation of the transfers and (2) from its interpretation of the legal content of the term 'consideration'." (Italics supplied).

As stated in the *Lueders* case (164 F. 2d, at p. 135):

> "It is too well-settled to require citation that generally for an act to constitute consideration it is essential that it or the promise to do it be simultaneous with the execution of the contract. Also, that it is the presence of legal consideration which makes a transfer of property a sale and the absence of consideration which makes a transfer a gift."

Thus, when the transfers are made at different times, an agreement must be shown to have existed in order to find a consideration.

In *McLean v. Commissioner*, 41 B.T.A. 1266 (1940), (affirmed on this point in *Commissioner v. McLean, supra*), the Board of Tax Appeals, applying the same principles in a gift tax case, held that identical trusts executed by a husband and wife simultaneously for the benefit of each other were "absolute gifts" and declared (41 B.T.A., at p. 1267):

> "* * * The fact that the trusts were created at the same time and contained reciprocal provisions does not prove

that one was created in consideration of the other, and the fact that the transfers were in equal amounts and made at the same time does not show that one was made in consideration of the other."

The Fifth Circuit, affirming, stated (127 F. 2d, at p. 943):

> "* * * Neither in the transfers nor in the stipulation is there any statement that the transfer by petitioner was in consideration of the transfer by his wife or vice versa. Nor is there any evidence from any source that the transfers in trust were other than *donative in intent* and in effect. Taxpayer may not by merely pointing to the fact that the trusts were created at the same time; were in equal amounts; and contained reciprocal provisions, claim a discharge of the burden resting on him to show that the transfers were *made in consideration* of each other. * * *." (Italics supplied).

Of course, in the *McLean* case it was the taxpayer who contended that the trusts were created in consideration of each other, whereas in the present case it is the Government which contends for that position. But no matter which side is on the initiative, the *McLean* case demonstrates that whether transfers were made in consideration of each other *does not depend* upon the facts that the trusts were created at the same time, were in *equal amounts*, and contained *identical reciprocal provisions*. Those are not the pertinent facts with respect to *whether the transfers were made in consideration of each other*. Other facts, pertaining to the motivating causes of the transfer, are determinative as to whether the transfers in trust were other than donative in intent and in effect.

In *Estate of Lindsay v. Commissioner, supra*, a husband had signed a trust instrument, with a life estate to his wife,

between the 4th and 19th of December, 1934, but dated it December 28, 1934, and it was delivered to and accepted by the trustee on the latter date; his wife signed a similar trust instrument with a life estate to the hubsand on December 27, 1934, and it was also delivered to and accepted by the trustee on December 28, 1934. Both trusts consisted of corporate stocks, and they were in substantially equal amounts. The Tax Court, nevertheless, held they were not executed in consideration for each other based on its finding that: 'We are satisfied, on the record, that there was neither *agreement* nor tacit *understanding* between the two grantors that the trusts should be created" (2 T.C., at p. 178); and that "The clear inference from the testimony * * * is that there was no concert of action or *prearranged agreement* between the parties" (2 T.C., at p. 179).

The Tax Court appropriately declared in *Estate of Ruxton v. Commissioner*, supra (20 T.C., at p. 494):

> "The very nature of the issue involved herein is such as to raise doubts in reaching an ultimate conclusion. However, in addressing ourselves to the question we are not unmindful that the doctrine of 'reciprocal' or 'crossed' trusts which respondent seeks to apply is not a statutory provision made operative by the specific terms of a trust instrument of the decedent, but instead is a concept of the courts. That concept is based on reason and analysis where the facts and circumstances of a particular case warrant going outside the formal terms of a trust instrument and looking to the *reality* of the situation, namely, that a person other than the nominal grantor is the *actual transferor* of property with retained economic interests in or control of the property, thus obtaining the same resultant tax con-

sequences as if such person had done directly what he tried to do by indirection. In our opinion, *that doctrine should be applied only when clearly warranted by the particular facts of a case* considered in the light of the decided cases." (Italics supplied).

The Tax Court also pointed out (20 T.C., at p. 495):

"We think the motives of the parties certainly have a bearing on their *intentions with respect to* unity of purpose, interdependence, and *consideration or the lack thereof.*" (Italics supplied).

"In the instant case, the uncrossing of the trusts and the transportation of the decedent and her husband as the grantor of the other's trusts would place each of them in a position entirely untenable with the giving of a *quid pro quo* to induce the action of the other and also untenable with the materially different expressed desire or purpose of each as evidenced by their respective trusts."

B. The consideration test as set forth in the Lehman case has been expressly recognized, accepted and approved as the appropriate judicial standard.

As pointed out by the petitioner (Pet. Br., pp. 8, 13-14, 22-25, 28, 33, 35), Congress, in the Technical Changes Act of 1949, considered it necessary to provide relief against the harshness and inequity of retroactive applications of the Lehman rule, and in the committee reports expressly stated the Congressional understanding of that rule to be as follows (S. Rep. No. 831, 81st Cong., 1st Sess., pp. 5-6, as quoted in Pet. Br., p. 23):

"However, in 1940 in *Lehman v. Commissioner*, 109 F. 2d 99, the Circuit Court of Appeals for the Second

> Circuit held that *where trusts are found to have been created each in consideration of the other*, the nominal grantors are to be interchanged for tax purposes." (Italics supplied).

See, also, H.R. Rep. No. 920, 81st Cong., 1st Sess., pp. 5-6.

The committee reports plainly show that Congress addressed itself exclusively to the consideration test as enunciated in the *Lehman* case, for the committee reports do not mention any other case or any other test.

Thus, if the relief provision can be construed as equivalent to Congressional enactment of the *Lehman* decision, as petitioner asserts, it is clear that Congress expressly recognized, accepted and approved the test of whether "the trusts are found to have been created each in consideration of the other", as conceived in the *Lehman* case, as the correct and appropriate standard for determination of whether "the nominal grantors are to be interchanged for tax purposes." It follows, under this test, that there is no foundation for interchanging trusts which are found *not* to have been in fact created "each in consideration of the other," but as gratuitous gifts inspired by the donative instincts of each transferor.

C. The Internal Revenue Service has recognized and applied the consideration test as the proper and essential standard for identifying the transferor as settlor of a trust.

The Internal Revenue Service has long recognized the consideration test, as announced in the *Lehman* case and followed in all of the other cases cited above, as the deter-

minative test of whether one grantor should be treated as the grantor of a trust for his benefit created by another. For example, in Rev, Rul. 57-422, 1957-2 C.B. 617, the Revenue Service states, with respect to simultaneous transfers by a husband and wife of X Company stock in trust to each other for life with remainder to their children:

> "H is presumed to have granted W a life estate in the trust created by him *in consideration of* receiving a life estate in the trust created by her. *Therefore*, each decedent may be regarded * * * as the grantor of the trust in which the decedent was the life beneficiary and as having retained a life interest in the right to the income from the property transferred by the decedent in trust." (Italics supplied).

Besides applying the consideration test in countless administrative dispositions of estate tax cases, the Government has successfully argued in cases such as *Estate of Guenzel*, *supra*, and *McLean v. Commissioner*, *supra*, that a husband may not be treated as having made a transfer to an identical trust which his wife simultaneously created in the absence of proof that the trusts were created in consideration of each other.

D. The Court of Claims in the decision below correctly applied the principles established by judicial doctrine, Congressional approval and administrative practice.

As the above analysis reveals, all of the judicial decisions in cases involving the issue presented in this case have uniformly and harmoniously applied the rule, as originally formulated in the *Lehman* case almost three decades ago,

as recognized and approved by Congress; and as administratively applied.

The essential criterion applied in all of the cases has been simply a question of fact whether one trust was made in consideration of the other. The "consideration" concept embraced in this principle is not, as petitioner asserts, a narrow technical concept confined to the law of trusts and contracts. It is, instead, a commonly understood term which pervades all areas of law, especially tax law, and most particularly estate tax law. The term "consideration", in fact, appears in Section 811(c)(1), the very statute here being applied.

The term "consideration" has been used in the "reciprocal trust doctrine" cases, and was used by the Court of Claims in the decision below, in its commonly understood sense. As formulated in the *Lehman* case, it embodies the question whether the decedent's transfer of his property "caused" the recipient to make a transfer of property for the decedent's benefit, or as otherwise expressed in that case, whether the decedent by paying a *quid pro quo* has caused another to make a transfer of property for his benefit (109 F. 2d, at p. 100), or, as restated in the *Hanauer* case, "whether the decedent's property, by its transfer in trust, had served as a *quid pro quo* effective to bring about his brother's transfer" (149 F. 2d, at p. 858).

This question cannot be answered merely by looking at the forms of the trust instruments to see if they are

similar in wording, or merely by reference to the times of the transfers or who prepared the papers or arranged the necessary formalities, although these and other matters of form and superficial appearance should certainly be taken into consideration as circumstantial factors from which the purpose, reason, motivation or "cause" of the transfer of property may be inferred. But even where those circumstantial factors, or some of them, are present, they should not preclude consideration of any other available evidence, in balanced perspective, that may serve to illuminate the real causes of the transfer.

The Court of Claims, in deciding this case, specifically applied the Congressionally-approved *Lehman* rule in the same terms as it was originally expressed by the Second Circuit Court of Appeals, and sought to determine the question of fact raised by the *Lehman* doctrine: whether Janet was "induced or caused" to transfer her property to the Janet Grace trust by the decedent's previous transfer of his property to the Joseph Grace trust (Op. 4-5, R. 60); and whether the decedent by his transfer in trust was "furnishing consideration for", or "paying for" Janet's transfer in trust (Op. 4, R. 60). The Court of Claims took into account that, "unless rebutted by clear evidence", consideration may be "inferred from the fact that the properties included in the two trusts are of approximately the same amount, that the trusts are created at or about the same time, and that each grantor gives the other a life estate in income" (Op. 13, R. 70); taking "the view of those cases

which impose the burden on the taxpayer to rebut any inference arising under the circumstances", the Court concluded: "* * * we think the burden has been met." (R. 74)

Based on all of the evidence, which was voluminous, the Court of Claims found that neither settlor's transfer of property in trust was in consideration of the other settlor's transfer of property in trust (Finding 30, R. 109). This fact finding, which is not disputed by the petitioner, required a decision for respondents according to the *Lehman* doctrine.

II. ANSWER TO PETITIONER'S BRIEF.

A. The trusts involved in this case are not in fact similar to the hypothetical "prototype" reciprocal trusts to which Petitioner's argument is addressed.

Petitioner's argument is addressed primarily to an inflammatory condemnation of "prototype" reciprocal trusts in prejudicial terms (*e.g.*, device, scheme, formalisms ingeniously devised to escape tax, etc.) and the reasons why such prototypes should be taxed reciprocally.

Since the trusts actually involved in this case do not resemble the pattern of "reciprocal" trusts, petitioner's counsel naturally prefers to avoid discussion of the facts involved in *this* case and concentrate instead on hypothetical prototype trusts that should be taxed reciprocally.

The essence of petitioner's argument is that, because some other taxpayers (usually spouses) have created "prototype" reciprocal trusts in consideration of each other as a device to

avoid estate taxes, and because such prototypes have properly been "uncrossed" by application of the consideration test under the *Lehman* doctrine, the decedent in this case should be treated *as if* a "prototype" reciprocal trust scheme cleverly devised for evasion or avoidance of estate taxes is involved.

The defect in this syllogism is that the major premise is false. Petitioner's assertion that the trusts involved in this case are "prototype" reciprocal trusts is proved only by the circumstance that PETITIONER'S COUNSEL SAYS SO. No logical explanation is furnished as to how this conclusion is arrived at.

When the actual facts of this case are considered in balanced perspective, the two trusts here involved disclose no pattern similar to prototype reciprocal trusts. In fact, the Joseph Grace trust and the Janet Grace trust were by nature so non-reciprocal in effect and in their real and practical objectives and consequences that they appear to be anti-types rather than prototypes of "reciprocal" trusts.

The essential pattern of "prototype" reciprocal trusts reveals two trusts having identical subject matter. All of the cases involving trusts alleged to be reciprocal (including the cases holding such trusts not taxable reciprocally) have involved two trusts having identical corpus, or so nearly identical that the real and practical effect is the same in substance as if each settlor had retained an interest in the property which he himself transferred in trust. By contrast,

the subject matter of the Janet Grace trust, which consisted principally of the family homestead, was entirely different and opposite in nature and economic significance as compared with the subject matter of the Joseph Grace trust, comprised of speculative investment assets. The very objective of the prototype reciprocal trust device is that each grantor seeks to retain the equivalent of an interest in the property he purports to give away by exchanging it for an interest in property that is for all practical purposes identical. By contrast, the homestead property of the Janet Grace trust was so distinctly opposite in functional nature from the properties which the decedent transferred to the Joseph Grace trust that the "prototype" objective could not be achieved, for the Janet Grace trust did not give the decedent an interest in properties similar to the investment assets he transferred to the Joseph Grace trust.

More importantly, the real and practical economic objectives and effects of the Joseph Grace trust were entirely different from those of the Janet Grace trust. The creation of the Janet Grace trust was for all practical purposes without any economic consequences. Both Janet and the decedent had occupied Tullaroan as their home for 20 years before Janet transferred the legal title to the Janet Grace trust, and b th undoubtedly had every expectation of continuing to do so for the rest of their lives. The creation of the Janet Grace trust did not result in any change in the possession, enjoyment or use of the homestead by either the decedent or his wife. The net effect was that she would

continue to possess and enjoy the homestead at his sufference instead of him at hers, which was surely of little practical or economic consequences to either of them. The creation of the Janet Grace trust, obviously, did not have the substance or economic effect of permitting the decedent to "retain" for his life the right to the income from his commercial investments which he transferred to the Joseph Grace trust. By creating the Joseph Grace trust, on the other hand, the decedent parted with the ownership of substantial real estate investments which passed outright to his children some 13 years before he died.

While Janet Grace, in creating the Janet Grace trust, doubtless retained possession and enjoyment of the Tullaroan property and the stock committed to payment of taxes upon it, and intended to retain the possession of that property for the rest of her life, this retention of possession was not derived from the decedent's transfer of his properties to the Joseph Grace trust. The fact that the Joseph Grace trust was created within the same month did not have the effect of permitting Janet to retain possession of the Tullaroan property which she transferred to the Janet Grace trust. She retained possession and enjoyment of Tullaroan without regard to, and without any particular relationship to, the Joseph Grace trust. She would have retained the possession and enjoyment of Tullaroan even if the decedent had not created the Joseph Grace trust, and the decedent's transfer of investment assets to the Joseph Grace trust did not add or contribute anything to Janet's retention of the possession and enjoyment of Tullaroan.

There is, therefore, in the objective economic results of the two trusts involved in this case, an absence of the pattern of reciprocity usually attributed to prototype reciprocal trusts. Moreover, there is simply no way that these particular trusts could conceivably have accomplished the hoped-for objectives of prototype reciprocal trusts as described in petitioner's brief.

There is lacking, too, in the pattern revealed by the Joseph Grace trust and the Janet Grace trust, the reciprocation of taxable incidents that is the essential characteristic of the reciprocal trust device, described in petitioner's brief as follows (Pet. Br., p. 13):

> "Under this device two or more people would each establish a trust, giving one of the others a lifetime interest in or some power over the corpus. Such an interest or power, if retained in favor of the settlor of the trust, would have required inclusion of the corpus in the settlor's estate upon his death. The hope was to avoid the thrust of the predecessors of Sections 2036-2038, which then, as now, expressly spoke only in terms of interests or powers retained in the settlor."

The whole object of such a reciprocal device was for each settler to *rid* himself of all taxable powers over the corpus by exchanging taxable powers with the other settlor. Yet the decedent and his wife, instead of *exchanging* taxable powers, each *retained* for himself and herself, respectively, by the express terms of their trust instruments, a sufficient power over the corpus of his or her own trust to require inclusion of the corpus of the trust created by each in his or her taxable gross estate. Under clause *First* of each trust instru-

ment, each settlor, as one of three trustees of the trust he or she created, expressly retained the power to change the enjoyment of the corpus through the exercise of a power to alter, amend or revoke by distributing to the life beneficiary "any amounts of the principal of the said trust, up to and including the whole thereof, which the said Trustees or a majority of them may at any time or from time to time in their sole discretion deem advisable." (Findings 11 (a) and 12 (a), R. 93, 98-99). Such a power retained by the settlor required inclusion of the corpus in the settlor's estate upon his or her death while holding the power, under Section 811(d) (2) of the 1939 Code and the identical provisions of Section 302 (d) of the Revenue Act of 1926 as in effect at the time of creation of these trusts. *Lober v. United States*, 346 U.S. 335 (1953), affirming Court of Claims decision, 124 Ct. Cl. 44, 108 F. Supp. 731 (1952); *Commissioner v. Holmes*, 326 U.S. 480 (1946); *Commissioner v. Estate of Newbold*, 158 F. 2d 694 (2d Cir. 1946); *Hurd, Exrs. v. Commissioner*, 160 F. 2d 610 (1st Cir. 1946); *Mellon, et al, Exrs. v. Driscoll*, 117 F. 2d 477 (3rd Cir. 1941), cert. den. 313 U.S. 579; *Welch v. Terhune*, 126 F. 2d 695 (1st Cir. 1942), cert. den. 317 U.S. 644; *Union Trust Co. v. Driscoll*, 138 F. 2d 152 (3rd Cir. 1943), cert. den. 321 U.S. 764; *Estate of Loughridge v. Commissioner*, 183 F. 2d 294 (10th Cir. 1950), cert. den. 340 U.S. 830; *Estate of Inman v. Commissioner*, 203 F. 2d 679 (2d Cir. 1953); *Estate of Mollenberg v. Commissioner*, 173 F. 2d 698 (2d Cir. 1949); *Zirjacks v. Scofield*, 197 F. 2d 688 (5th Cir. 1952); and compare *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85 (1935).

The transfers in trust by the decedent and Janet did not at the time of execution thereof diminish the taxable gross estate of either of them. These trusts could not have accomplished the estate-tax-avoidance purpose of the reciprocal trust device as postulated by the petitioner, and neither of the trusts had that effect.

Being by their very nature and effects (whether viewed from the standpoint of practical economic effects or from the standpoint of estate tax attributes) non-reciprocal and non-reciprocating, these trusts simply do not fit the pattern of the hypothetical prototype against which petitioner's brief inveighs so invidiously.

B. Alternative tests of liability advocated by Petitioner are inadequate and unworkable.

Paradoxically, while petitioner's brief speaks in grand platitudes of the virtue of substance and reality over mere form, the variously stated tests or rules advocated by the petitioner as a substitute for the consideration test, as enunciated in the *Lehman* doctrine, are all aimed at exalting mere formalisms. Each of these proposed substitute tests is aimed at making the liability for estate tax dependent solely upon a restricted selection of facts related only to the form of the transaction, as determinative of the issue. Under any of the various tests proposed by petitioner, the courts would be precluded from considering any evidence with respect to the true substance and reality if the prescribed formal factors are present. Petitioner advocates,

in effect, that the Court overrule the *Lehman* principle and substitute a new doctrine making taxability depend solely upon such formalisms as the dates and provisions of trust instruments, whether they are drafted by the same lawyer, or other such matters of form, without regard to any other evidence pertaining to the question of whether the decedent is, in substance and reality, the person who "made a transfer" of the property in which he has a life estate. While making taxability dependent upon any such empirical data may have the virtue of ease of administration, it would be wholly inadequate to deal with the problem to which the *Lehman* principle is addressed.

The applicability of the "consideration" test is not dependent upon form, but searches out the substance and reality of the transactions. To reach this objective, the trial courts should be allowed to hear and consider all evidence available with respect to the true nature and substance of a transaction and the causes which motivated it, instead of being restricted to an observance of such superficial data as proximity of time, identical formal wording of instruments, or any other pure formalisms restricting the scope of the inquiry.

The consideration test as enunciated in the *Lehman* doctrine provides the one true and adequate test of whether, in any realistic sense, a decedent has "made a transfer under which he has retained" a property interest within the meaning of the statute. This principle should be adhered to as a salutary principle of tax law.

The "net effect" test advocated by Professor Lowndes (Pet. Br., 33-34) may be an adequate and proper standard for determining the extent of a taxpayer's liability, once he is determined to be liable, but provides no clue to whether or not the decedent has made a transfer of the character subject to tax. It can be applied only after reaching the conclusion that the decedent has made a transfer of the character subject to tax.

Accordingly, respondents urge the Court to reject the substitute tests and adhere to the *Lehman* principle as heretofore established.

C. Directly and indirectly, the petitioner has attacked the findings of fact below; however, those findings are sound and not "clearly erroneous".

Petitioner's brief attempts to side-step, minimize, or obliquely challenge the findings of the Court of Claims. This has been done by way of attacks on consideration, on the bearing of motivation and intent, and by way of a slippery "single transaction" argument. In the final portion of its brief the Government, as an alternative argument, seeks to overturn the findings directly.

We note first that the attempt to secure a reversal by charging error in deciding questions of fact appears not to be comprehended within the Petition for a Writ of Certiorari which this Court granted. The "Question Presented" (Pet. Br., p. 2) purported to state a question of law. The "Reasons" for grant offered in the petition were an alleged con-

flict between some decisions of the Courts of Appeals and the Court of Claims (Pet., pp. 7-14), alleged error by way of "a mistaken view of the statute" (Pet., pp. 14-17), application of the wrong legal standards by the court below (Pet., pp. 17-18), and the importance of the question to estate tax administration (Pet., 18-19). The respondents find no assertion in that petition that the findings of fact of the Court of Claims were "clearly erroneous". It is, however, the customary practice of the Court to consider only questions "urged in the petition for certiorari and incidental to their determination." *Rorick v. Devon Syndicate, Ltd.*, 307 U.S. 299 (1939). See, also, *Ryan v. United States*, 379 U.S. 61 (1964); *Trailmobile Co. v. Whirls*, 331 U.S. 40 (1947).

In the event, the grounds on which the petitioner would have this Court overrule the Court of Claims on fact-finding are a melange of odds and ends, and a thing of bits and tatters. The Government argues that Janet Grace was a non-entity, whose ideas were of "no importance" (Pet. Br., pp. 37-8). The Government argues that the taxpayer had the burden of proof (Pet. Br., p. 38) — which no one has ever disputed. The Government argues that there was a "single transaction" and no consideration was necessary (Pet. Br., p. 39). Finally, the Government urges that Joseph Grace was clearly an estate tax avoider, because Mr. Ross urged Mr. Iglehart to create reciprocal trusts and Iglehart was a friend of Joseph Grace (Pet. Br., pp. 39-40). To these contentions the Government adds its own argumentative, speculative inferences, e.g., "decedent may have been

less cautious than Ross" (Pet. Br., p. 41). These are make-weight arguments, all of which were presented to and thoroughly considered by the court below.

There is no doubt that the "question of whether the doctrine of the *Lehman* case can be applied — whether the trusts are crossed or reciprocal trusts — is one of 'fact.'" *Estate of Moreno v. Commissioner, supra.* Obviously, upon different evidence one court may reach a different conclusion than another without either court being in error. See *Estate of Hanauer v. Commissioner, supra.*

As an initial matter, the question whether a transaction or series of transactions is to be viewed as an integral whole is an issue for resolution by the fact finders whose decision will be reversed only if clearly erroneous. *Tennessee, Alabama & G. Ry. Co. v. Commissioner*, 187 F. 2d 826 (6th Cir.). "It is for the trial court upon consideration of an entire transaction, to determine the factual category in which a particular transaction belongs." *United States v. Cumberland Public Service Co.*, 338 U.S. 451, 456 (1950).

The scope and nature of review of a factual determination has been the subject of definitive analysis by this Court in the tax case of *Commissioner v. Duberstein*, 363 U.S. 278 (1960). The ultimate factual issue there — whether gifts were made — is analogous to the ultimate issue here. The Court's analysis of the weight to be given to well-grounded conclusions of a trial tribunal with respect to such matters is apropos (363 U.S., at pp. 289-90):

"Decisions of the issue presented in these cases must be based ultimately on the application of the fact-finding

tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case. The nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of abscribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact.

* * *

"Doubtless diversity of result will tend to be lessened somewhat since federal income tax decisions, even those in tribunals of first instance turning on issues of fact tend to be reported, and since there may be a natural tendency of professional triers of fact to follow one another's determinations, even as to factual matters. But the question here remains basically one of fact, for determination on a case-by-case basis."

In conclusion the Court noted that a consequence of its view "is that appellate review of determinations in this field must be quite restricted" (393 U.S., at p. 290).

III. THE WRIT OF CERTIORARI WAS IMPROVIDENTLY GRANTED; THIS CASE SHOULD BE DISMISSED FOR THAT REASON.

As we have demonstrated above (see pp. 27-46, *supra*), the petitioner's first asserted reason for granting the writ of certiorari — that cases in several circuits conflict with the decision of the Court of Claims in this case — simply does not withstand analysis. All of these cases on which the petitioner relies require consideration as a condition to application of the reciprocal trust doctrine. While some cases em-

phasize objective evidence and others the intent of the settlors, the distinction between such cases is not due to any significant divergence in the courts' views of applicable legal principles but rather to their analysis of the particular evidentiary facts that were before them. Not a single court that has decided a "reciprocal trust" case has agreed with the petitioner's argument that the decedent's motives are immaterial for purposes of determining whether, in fact, the trusts are reciprocal.

Nor does the decision below raise an important question of law which deserves this Court's special scrutiny. The petitioner has never asserted that the decision of the Court of Claims creates serious administrative problems for him in the disposition of pending cases. He merely states that he expects future attempts to minimize taxes "through resort to reciprocal trusts" (Pet. Br., p. 19). Such attempts are improbable, we may note, in view of the existing risks. In any event, possible future problems are not the kind of pressing questions which the writ of certiorari was designed to bring here. See, *e.g., Brown v. Allen*, 344 U.S. 443, 491 (1953). Certainly this Court does not sit to resolve the petitioner's anticipatory administrative problems by finding different facts that did a court below.

After reviewing the petitioner's brief, it should be clear to the Court that in reality the issue here involved is essentialy factual in nature, and that the only real complaint of the Government is that it is dissatisfied with the findings of fact of the Court of Claims and essentially asks this Court to reach a different factual conclusion without having had

the opportunity to hear the evidence. Since this writ requires the Court essentially to reconsider facts found by a trial tribunal upon a full record instead of carrying out its function of determining great principles of law of national importance, the writ was improvidently granted and should be dismissed.

CONCLUSION

For the foregoing reasons the writ of certiorari should be dismissed as improvidently granted, or, alternatively, the decision of the Court of Claims should be affirmed.

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